

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION**

AERITAS, LLC,

Plaintiff

v.

WHATABURGER RESTAURANTS, LLC.

Defendant

Case No. 6:19-cv-00937

JURY TRIAL DEMANDED

AMENDED COMPLAINT FOR PATENT INFRINGEMENT

Plaintiff Aeritas, LLC (“Aeritas” or “Plaintiff”) files this Complaint for patent infringement against Whataburger Restaurants, LLC. (“Whataburger” or “Defendant”), and alleges as follows:

NATURE OF THE ACTION

1. This is an action for patent infringement arising under 35 U.S.C. § 1 et seq.

PARTIES

2. Aeritas is a limited liability company organized and existing under the laws of the State of Texas with its principal place of business in Dallas, Texas.

3. Upon information and belief, Whataburger Restaurants, LLC is a corporation organized and existing under the laws of the State of Texas, with its principal place of business at 300 Concord Plaza Drive, San Antonio, Texas 78216. Whataburger may be served with process through its registered agent Corporation Service Company dba CSC-Lawyers Incorporated, 211 E. 7th Street, Suite 620, Austin, Texas 78701. Defendant

operates businesses in multiple locations in this jurisdiction including, but not limited to at in this judicial district at 928 S 7th St, Waco, TX 76706.

JURISDICTION AND VENUE

4. This Court has original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1338(a).

5. Upon information and belief, Defendant is subject to personal jurisdiction of this Court based upon it having regularly conducted business, including the acts complained of herein, within the State of Texas and this judicial district and/or deriving substantial revenue from goods and services provided to individuals in Texas and in this District.

6. Venue is proper in this District under 28 U.S.C. §§ 1391 and 1400 because Defendant has committed acts of infringement and has regular and established places of business in this judicial district.

OVERVIEW OF THE WHATABURGER APP

7. Defendant provides for its customers use the Whataburger App, which is available for use with iOS and Android devices:





<https://apps.apple.com/us/app/whataburger/id1141643627>

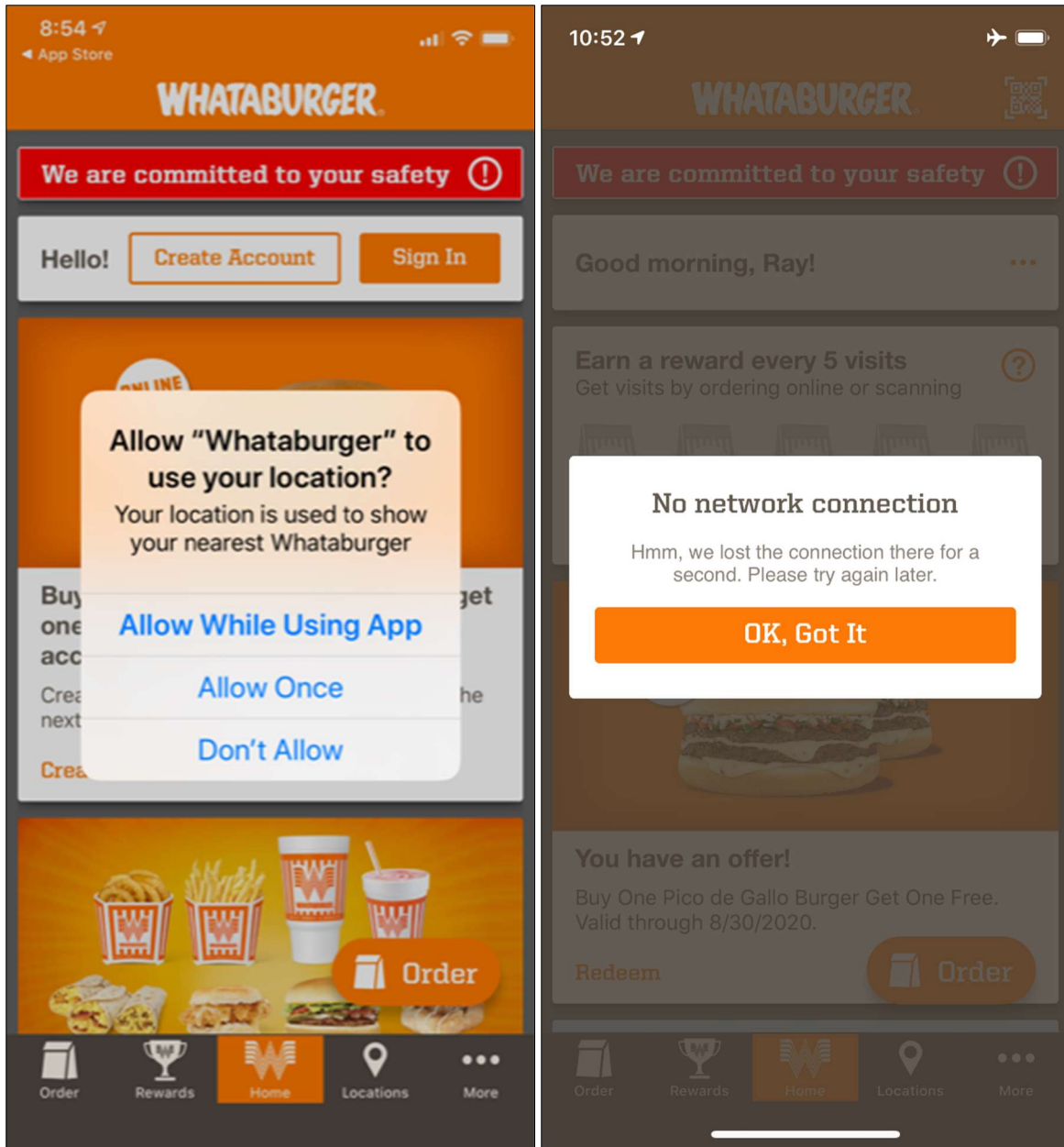


Check out the easiest, most rewarding way to get Whataburger just like you like it!

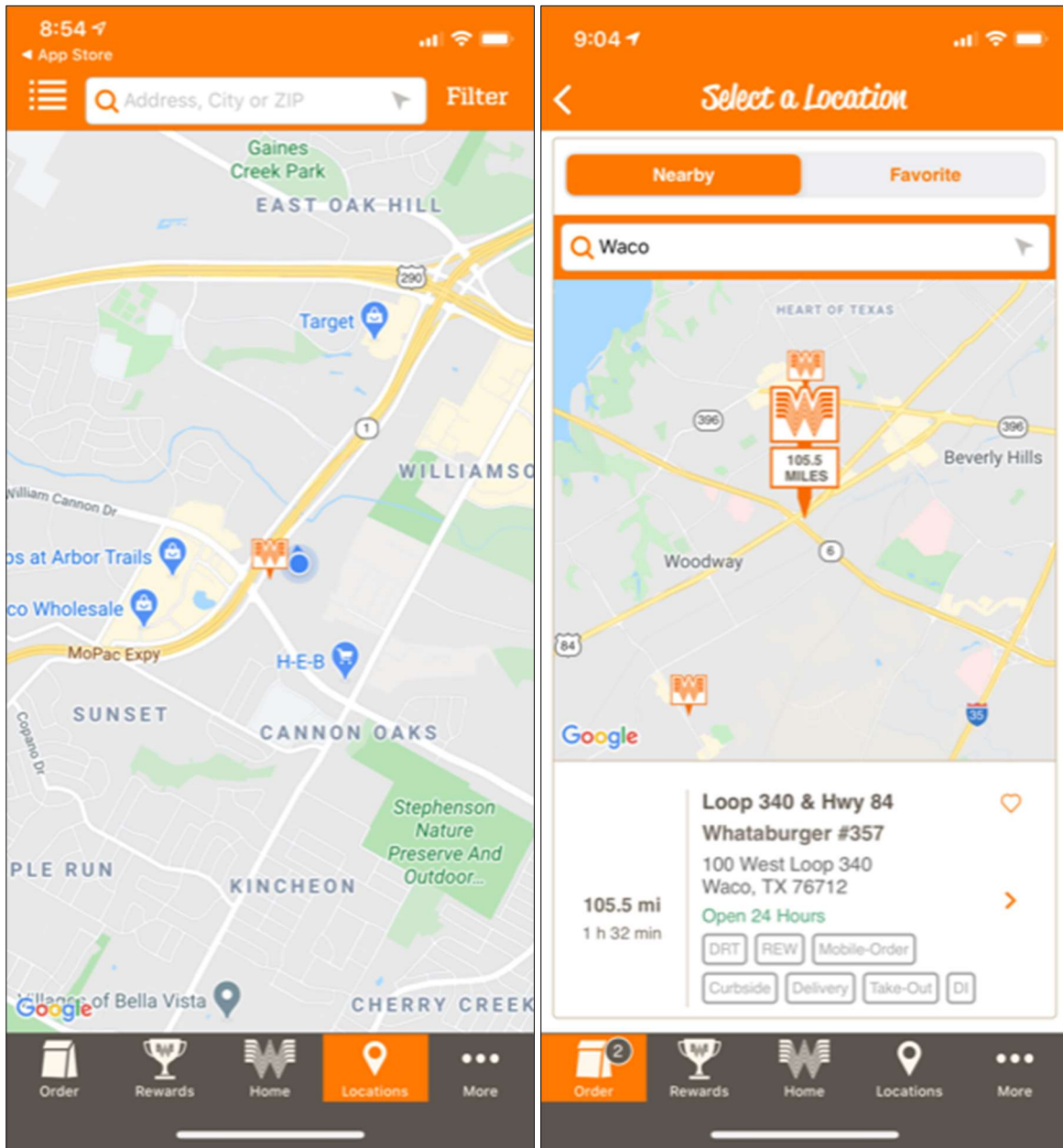
- ORDER ONLINE: Now testing in select locations, and we're gathering feedback along the way. Check Whataburger.com for updates on locations near you.
- CUSTOMIZE YOUR CRAVINGS: Try the endless possibilities of customizations and add-ons to perfect your order.
- SAVE YOUR FAVES: Save your favorite customizations and go-to meals to easily reorder again and again.
- EARN REWARDS: Five visits earns you free food. Order or scan your app on five separate visits and get a free Honey Butter Chicken Biscuit, Medium French Fry, Taquito, Cinnamon Roll, Small Shake, Medium Onion Ring or Medium Drink on your next visit.
- FIND YOUR HOMETOWN WHATABURGER: Take comfort in the fact that you'll always know exactly where the closest Whataburger is located.
- PAY WITH YOUR PHONE: Get your favorite food faster by connecting a debit/credit card, Apple Pay, PayPal, or Whataburger Gift Card.

<https://play.google.com/store/apps/details?id=wb.mobile.cx.client.droid>

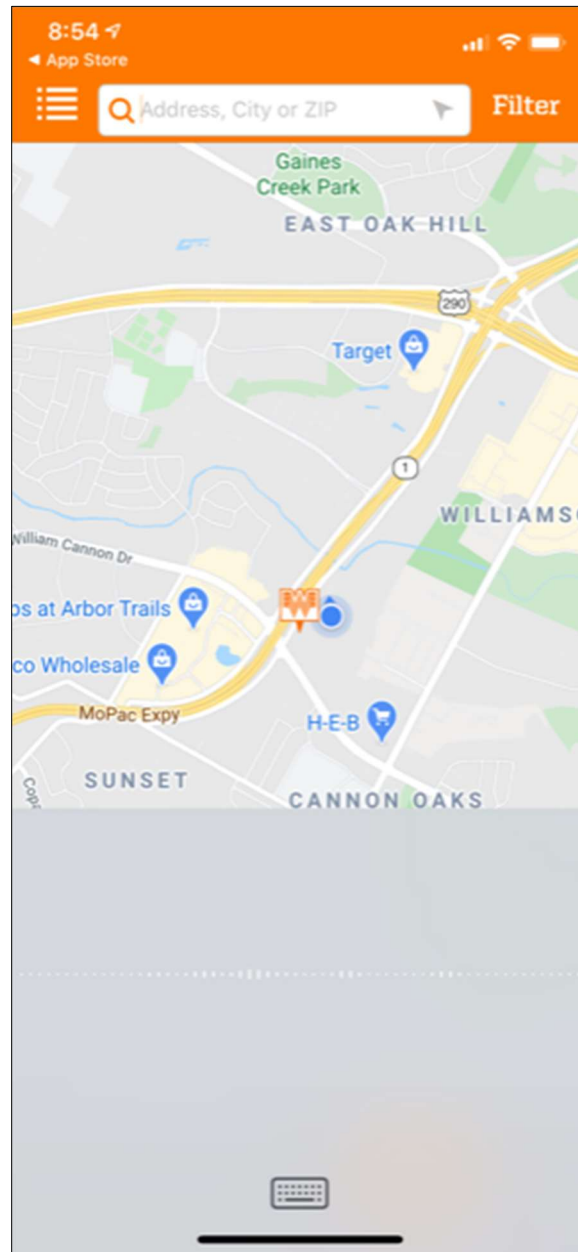
8. The Whataburger App uses the location of the user's device in order to identify the user's location and to operate properly.



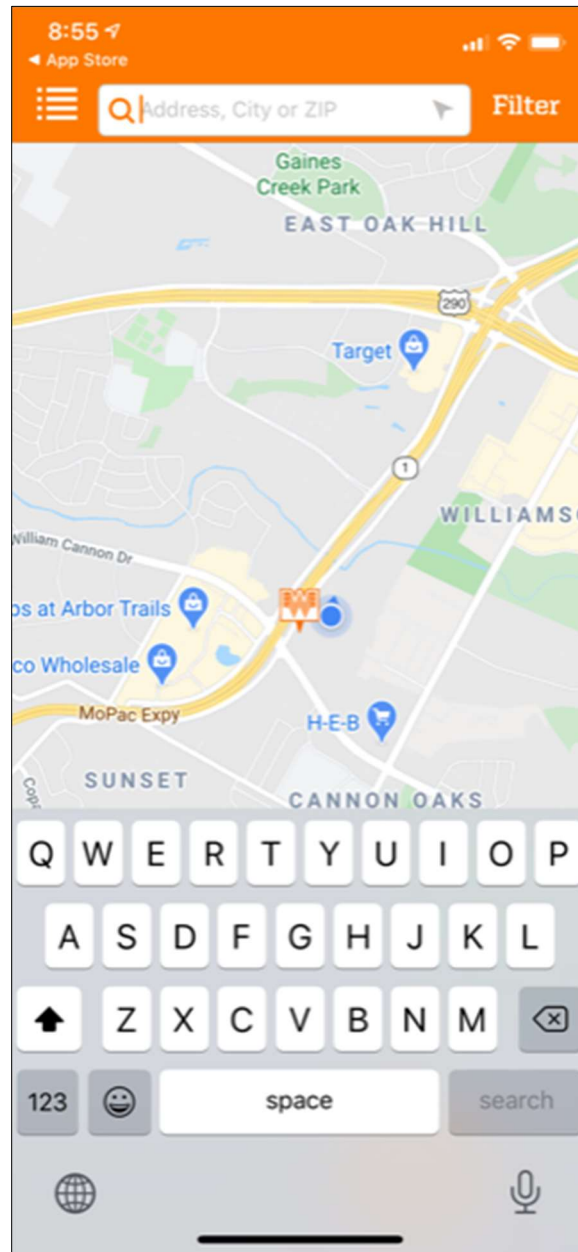
9. The Whataburger App and server uses the user's location to identify nearby Whataburger stores.



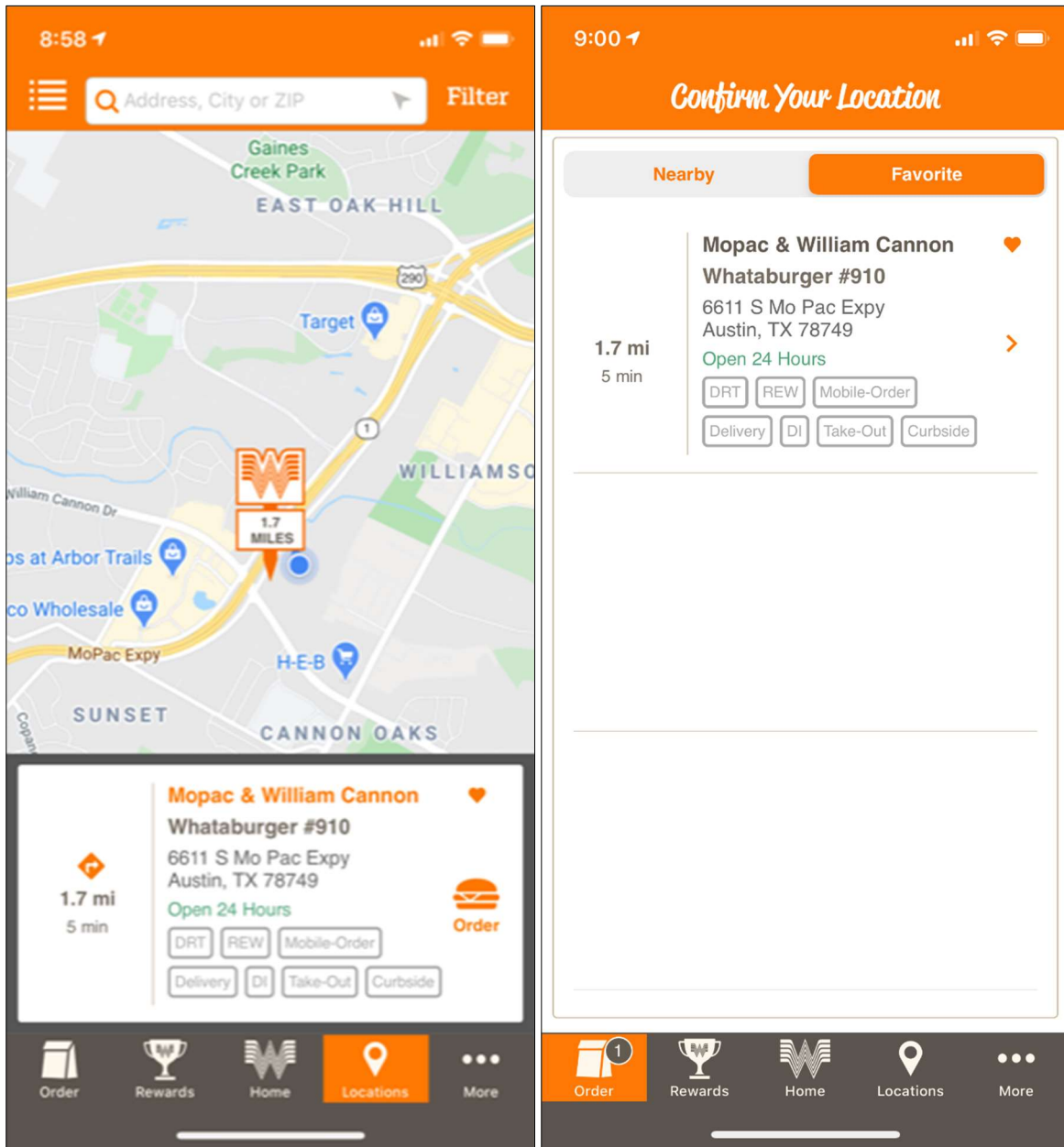
10. The Whataburger App uses the user's spoken input as criteria to search for and locate desired Whataburger stores.

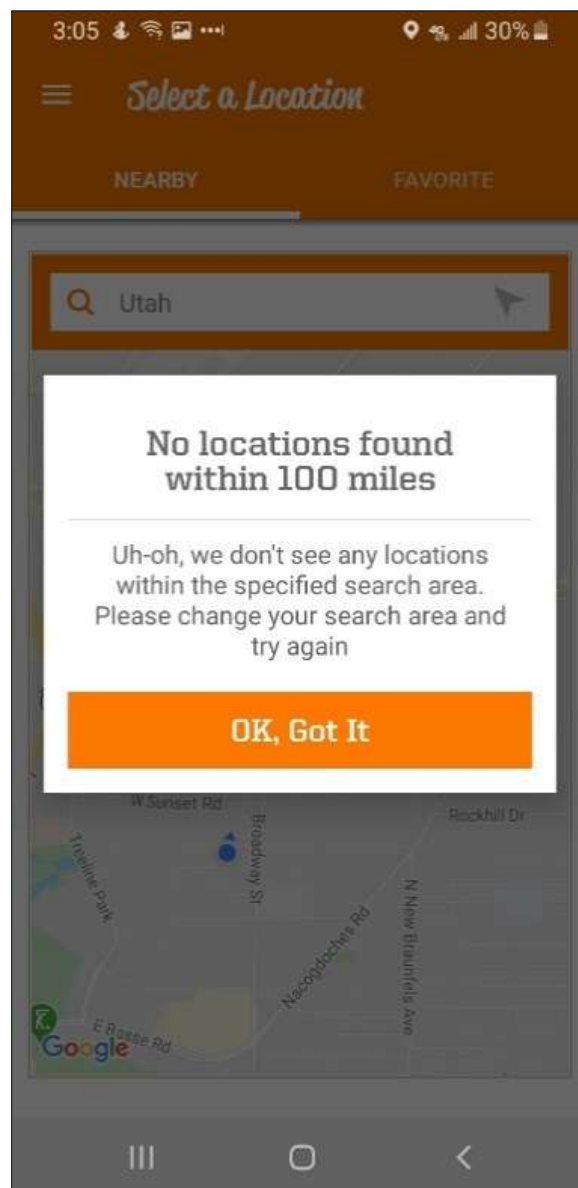


11. The Whataburger App uses the user's touch screen input as criteria to search for and locate desired Whataburger stores.

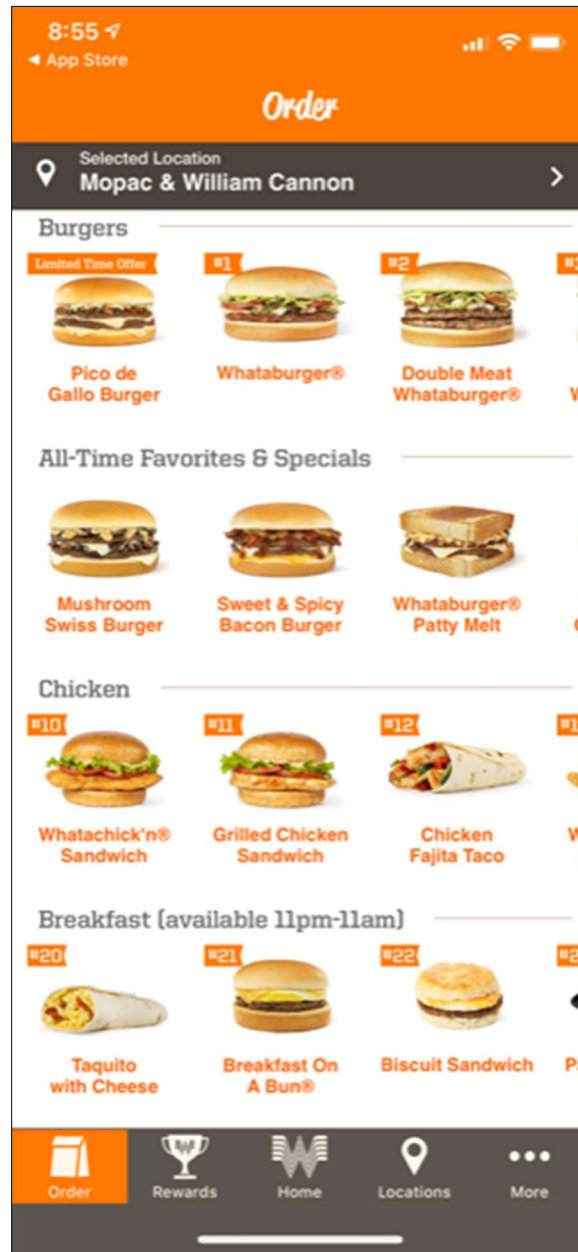


12. The Whataburger App allows a user to select a particular location as a favorite location, and the App provides additional details regarding the favorite location.

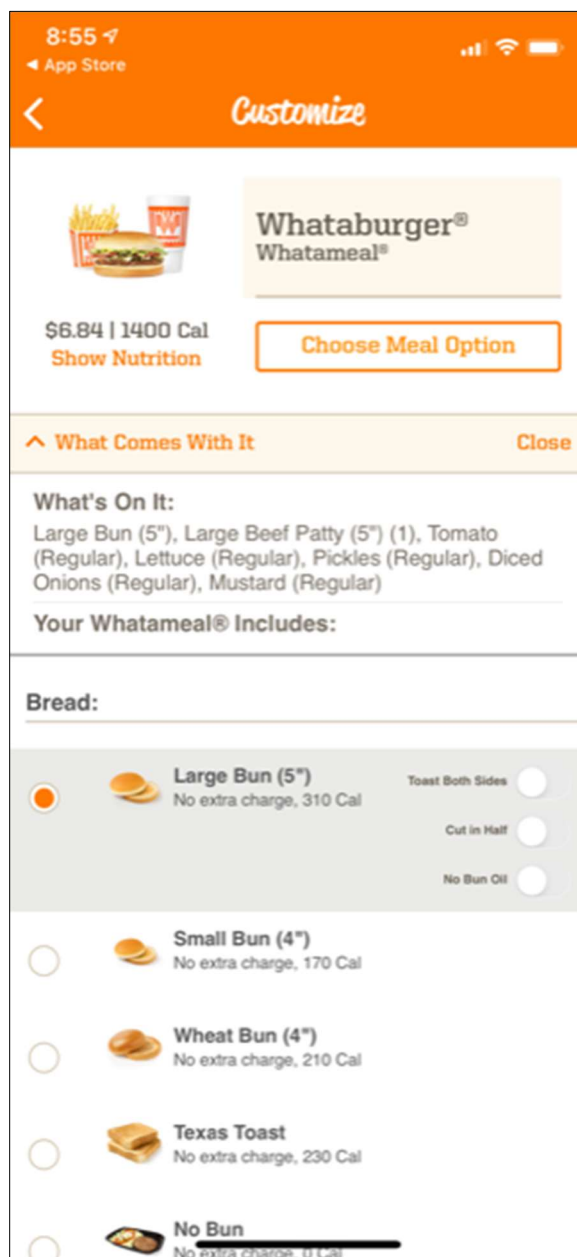




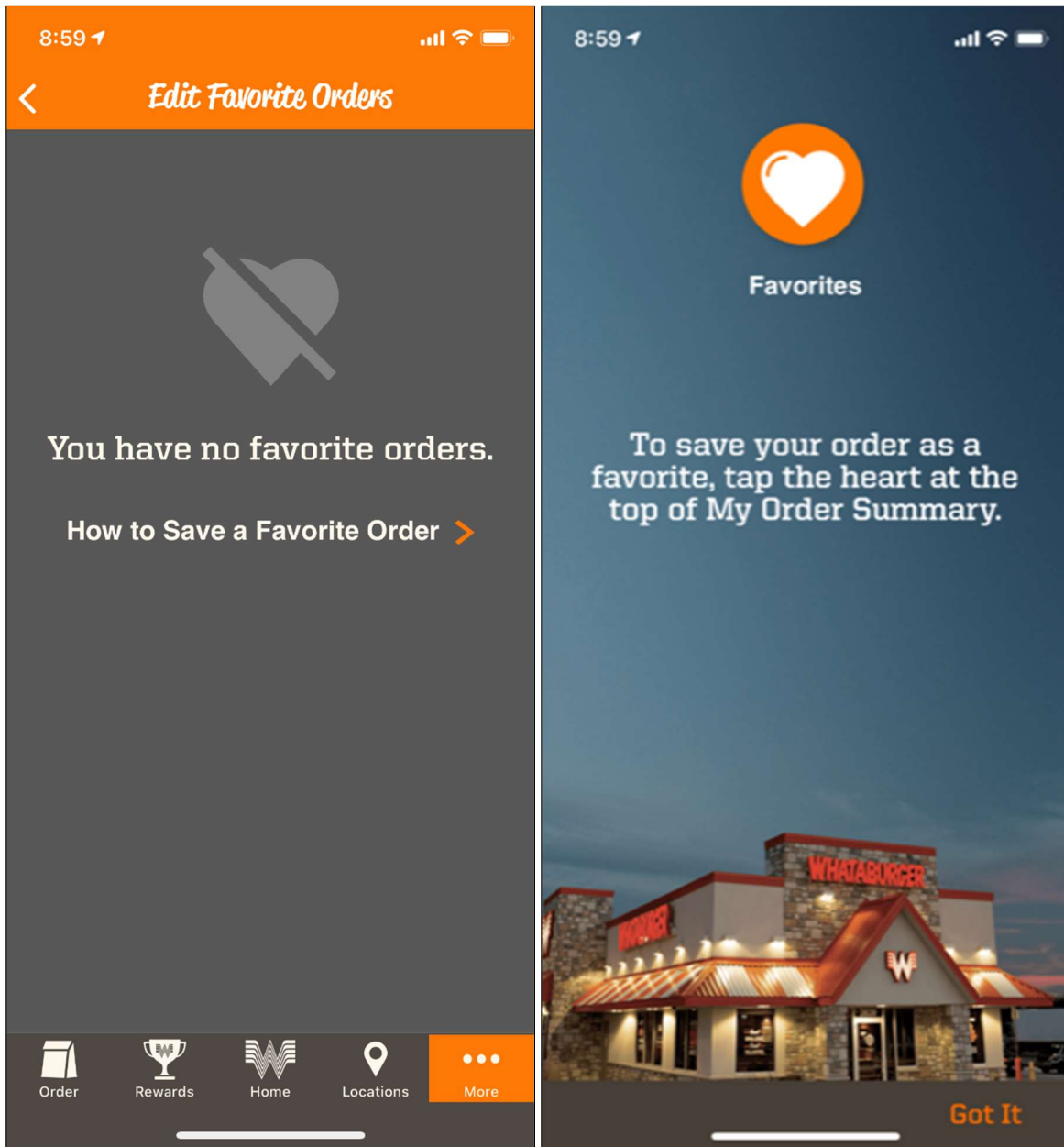
13. The Whataburger App and server allow the user to create an order for items at a particular Whataburger location.

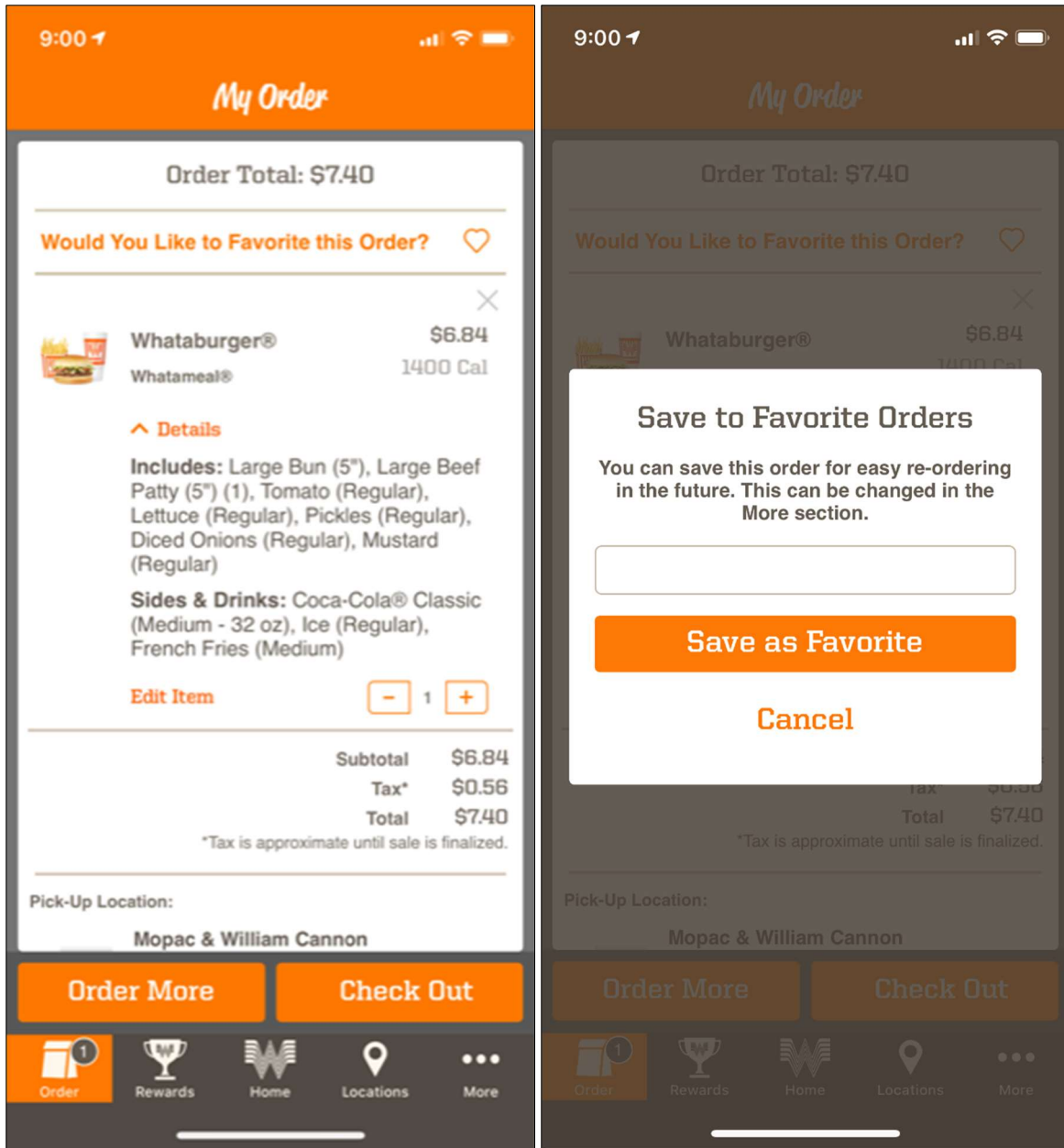


14. When placing an order, the Whataburger App provides additional details for a selected item.

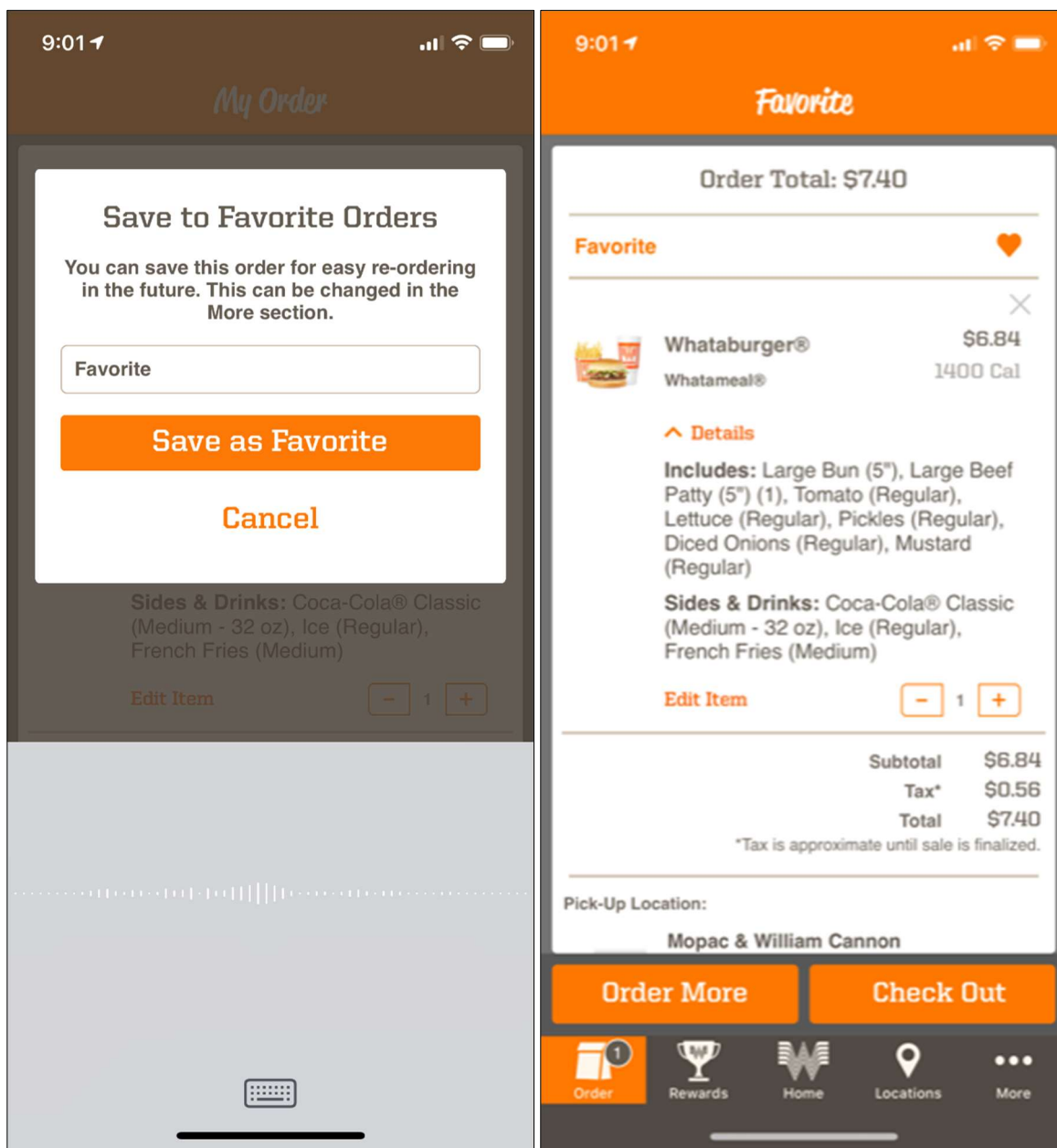


15. The Whataburger App allows a user to save an order as a favorite order.

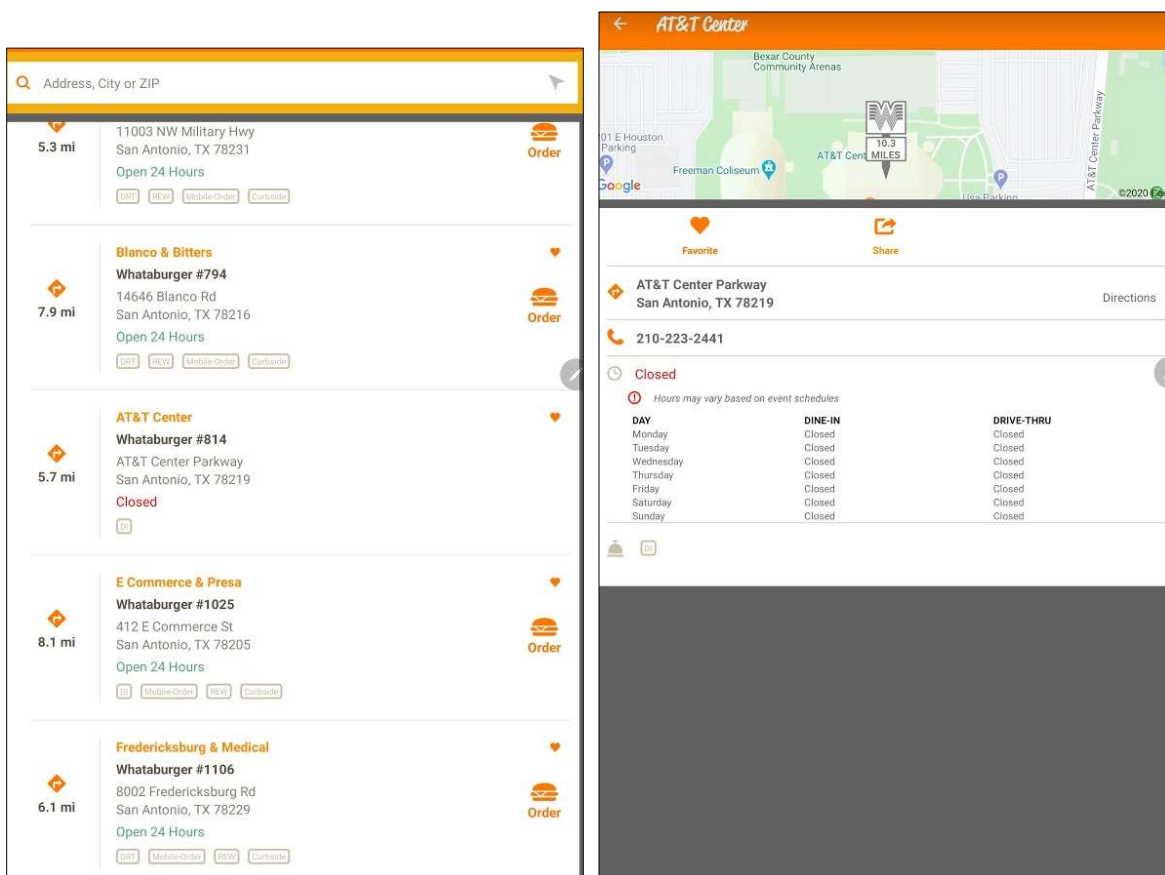


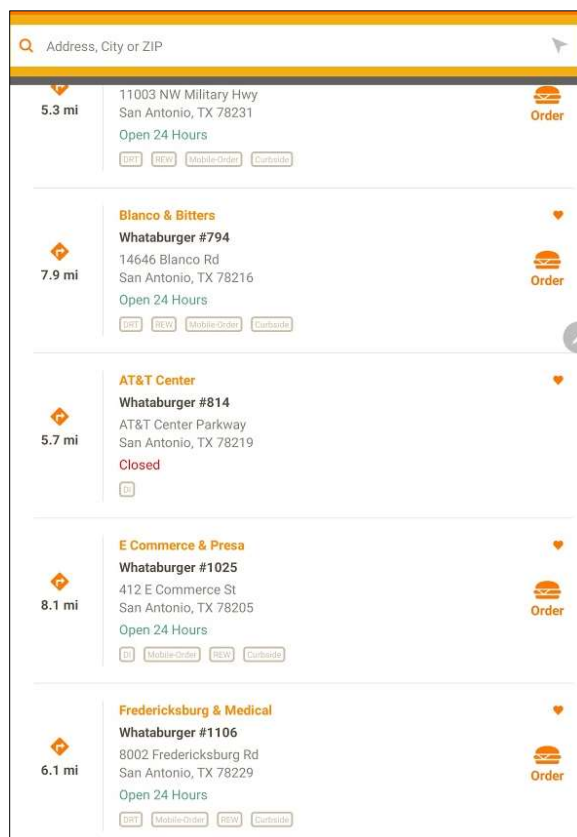


16. When saving the order as a favorite, the Whataburger app allows the user's to input a description of the order using voice input.

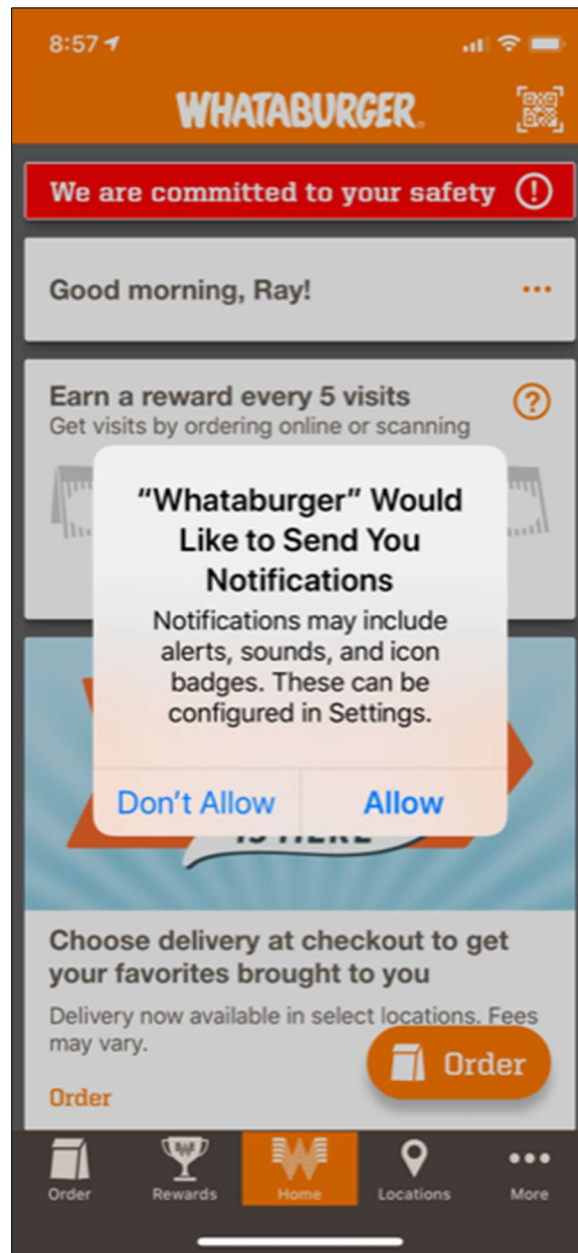


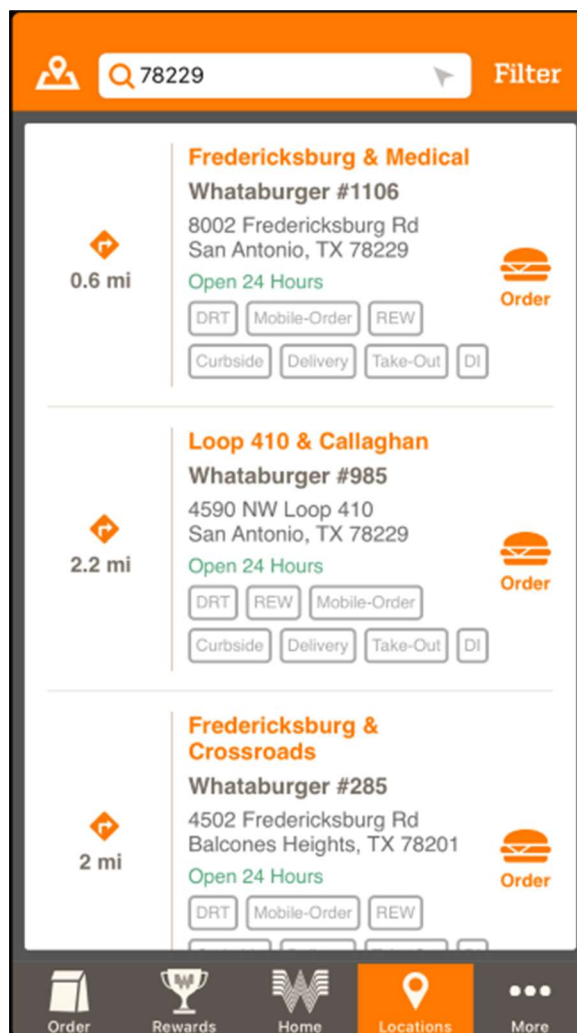
17. Based on the user's location and saved favorites, the Whataburger App is able to search for and obtain information related to each, including stores that are currently accepting mobile orders.

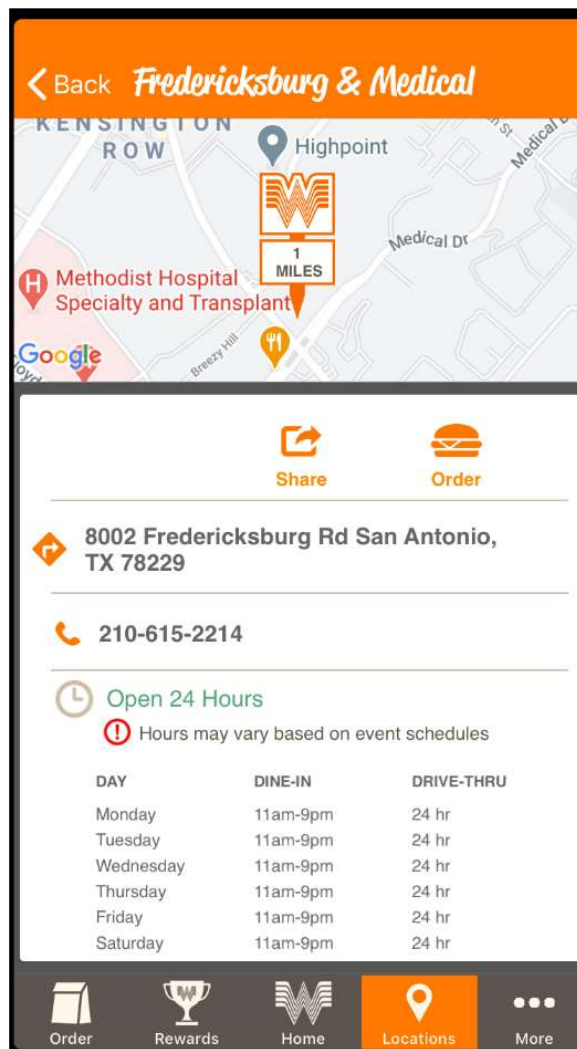




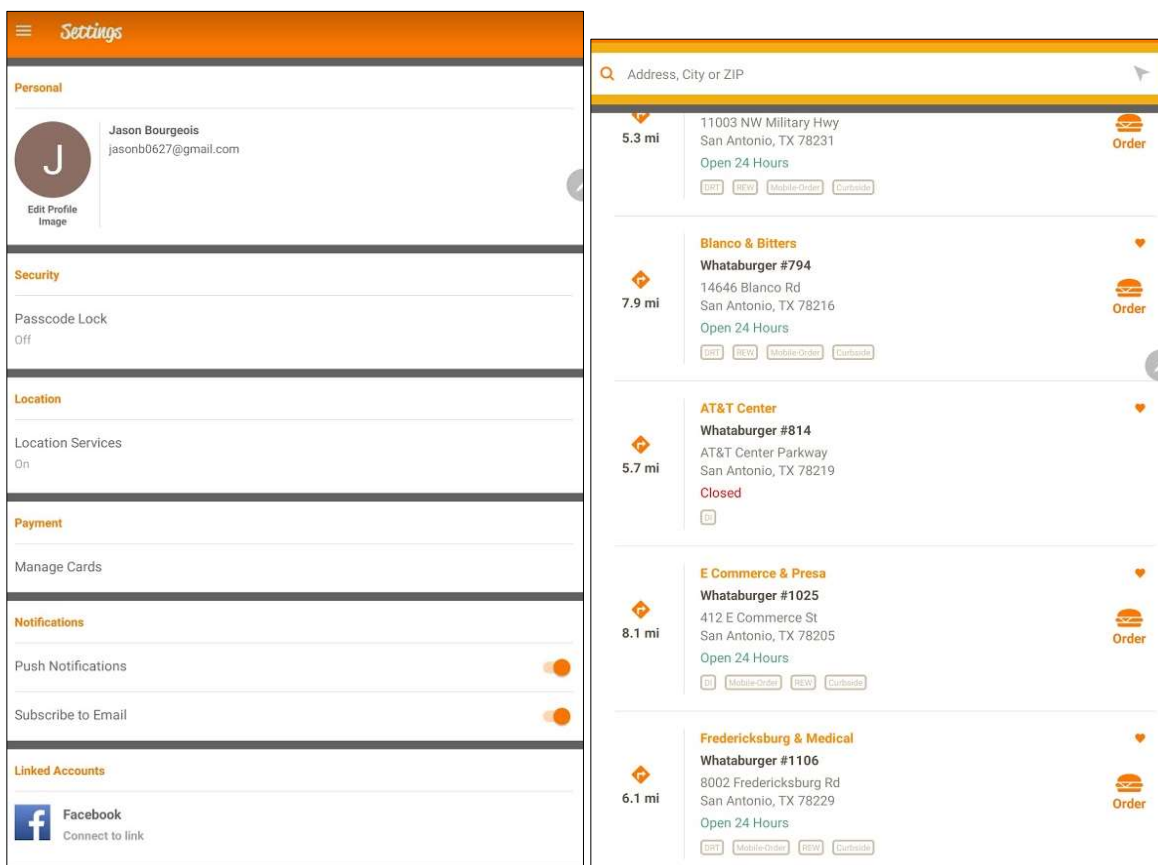
18. When the Whataburger App is connected to the Whataburger server, the App is able to receive notifications from the server, including a non-verbal response to spoken input.

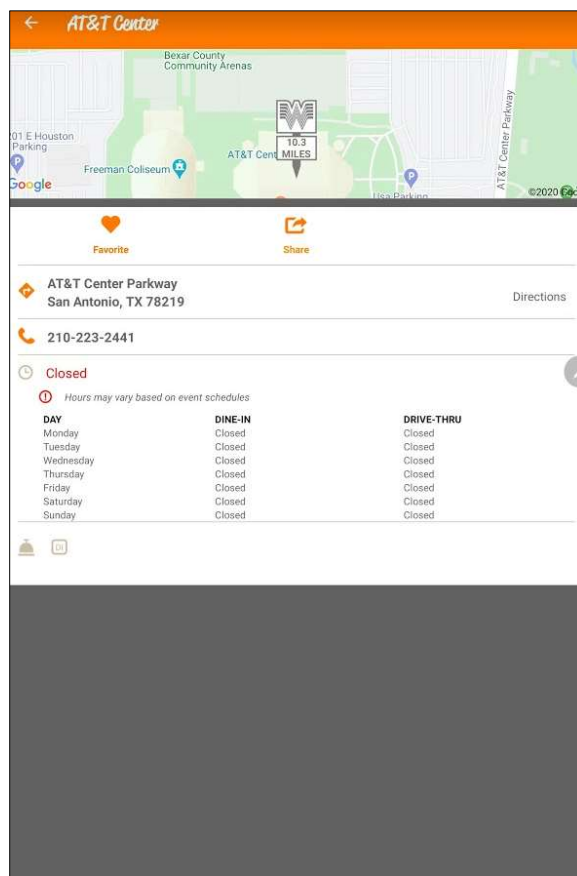




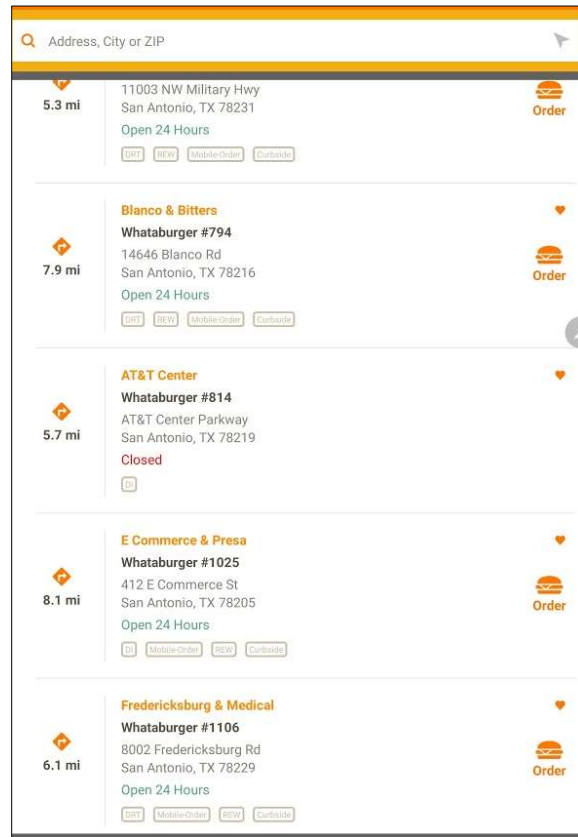


19. The Whataburger App includes notification criteria, which is used to determine when notifications are delivered to the user's device.





20. The Whataburger App receives results from the database search and delivers a list of favorited stores with their distance and if they are currently accepting mobile orders.



COUNT I **(Infringement of U.S. Patent No. 8,055,285)**

21. Aeritas incorporates paragraphs 1 through 20 as though fully set forth herein.

22. Plaintiff is the owner, by assignment, of U.S. Patent No. 8,055,285 (the “285 Patent”), entitled MIXED-MODE INTERACTION, which issued on November 8, 2011. A copy of the ’285 Patent is attached as Exhibit PX-285.

23. The ’285 Patent is valid, enforceable, and was duly issued in full compliance with Title 35 of the United States Code.

24. Defendant has been and is now infringing one or more claims of the '285 Patent under 35 U.S.C. § 271 by making and using the Whataburger App with users' iOS and Android devices and the Whataburger server in the United States without authority.

25. Defendant has also infringed the '285 Patent by encouraging users of the Whataburger App to use the user's iOS or Android devices with the Whataburger App to practice the claims of the '285 Patent.

26. Claim 1 recites:

1. A method, comprising:

at a first time, receiving and storing an input in a user profile in a

database, the input comprising consumer interest data;

at a second time distinct from the first time, obtaining data

identifying a current location of the mobile communication

device;

based on the input stored in the user profile and the current

location of the mobile communication device, initiating a

search to locate information pertinent to the input;

receiving results derived from the search; and

in response to the input and the search, delivering, by a

notification server, information to the mobile

communications device.

27. More particularly, Defendant infringes at least claim 1 of the '285 Patent. Defendant receives and stores an input in a user profile in a database, the input comprising consumer interest data. At a second time, data identifying a current location

of the mobile communications device on which the Accused Instrumentality is installed is obtained. Based on the input and location, Defendant performs a search to locate pertinent information (e.g., nearby stores) and receive the results of such search, distance from mobile device. Defendant then provides the information to the mobile communications device.

28. Aeritas has been damaged by Defendant's infringing activities.

COUNT II
(Infringement of U.S. Patent No. 9,390,435)

29. Aeritas incorporates paragraphs 1 through 20 as though fully set forth herein.

30. Plaintiff is the owner, by assignment, of U.S. Patent No. 9,390,435 (the "'435 Patent"), entitled MIXED-MODE INTERACTION, which issued on June 12, 2016. A copy of the '435 Patent is attached as Exhibit PX-435.

31. The '435 Patent is valid, enforceable, and was duly issued in full compliance with Title 35 of the United States Code.

32. Defendant has been and is now infringing one or more claims of the '435 Patent under 35 U.S.C. § 271 by making and using the Whataburger App with users' iOS and Android devices and the servers in the United States without authority.

33. Defendant has also infringed the '435 Patent by encouraging users of the Whataburger App to use the user's iOS or Android devices with the Whataburger App to practice the claims of the '435 Patent.

34. Claim 1 recites:

1. Apparatus, comprising:

a processor;

computer memory holding computer program instructions to:

receive first data indicating a permission to provide a mobile device user a notification, the notification having an associated notification criteria;

at a given time, determine a location of a mobile device;

based at least in part on a determined location of the mobile device and the notification criteria, to provide to the mobile device the notification, the notification being associated at the mobile device with one of: an audible, visual and tactile alert;

receive second data as a result of an input being received at the mobile device following the notification;

retrieve information associated with the input and the determined location of the mobile device; and

provide to the mobile device a response to the input, the response based on the retrieved information.

35. More particularly, Defendant infringes at least claim 1 of the '435 Patent. On information and belief, Defendant employs a processor and computer memory holding computer program instructions to perform the functions described above. Defendant receives data indicating permission to provide a notification to a mobile device user in accordance with notification criteria. At a given time, Defendant determines the location of the mobile device. Based on the location and notification criteria, Defendant provides at least a visual alert notification. Defendant receives second data as a result of an input being received at the mobile device, retrieves information associated with the input and

location, and provides responsive information to the mobile device (e.g., store information).

36. Aeritas has been damaged by Defendant's infringing activities.

COUNT III
(Infringement of U.S. Patent No. 8,620,364)

37. Aeritas incorporates paragraphs 1 through 20 as though fully set forth herein.

38. Plaintiff is the owner, by assignment, of U.S. Patent No. 8,620,364 (the "364 Patent"), entitled MIXED-MODE INTERACTION, which issued on December 31, 2013. A copy of the '364 Patent is attached as Exhibit PX-364.

39. The '364 Patent is valid, enforceable, and was duly issued in full compliance with Title 35 of the United States Code.

40. Defendant has been and is now infringing one or more claims of the '364 Patent under 35 U.S.C. § 271 by making and using the Whataburger App with users' iOS and Android devices and the Whataburger servers in the United States without authority.

41. Defendant has also infringed the '364 Patent by encouraging users of the Whataburger App to use the user's iOS or Android devices with the Whataburger App to practice the claims of the '364 Patent.

42. Claim 1 recites:

1. Apparatus, comprising:

a processor;

computer memory holding computer program instructions to execute

a rules engine that correlates data identifying a location of a

mobile communication device, consumer interest data, data

associated with one or more inventory attributes, and

notification criteria that defines when a notification is to be delivered to the mobile communications device and a type of such notification, and to generate a message for delivery to the mobile communication device if at least one matching rule in the rules engine is triggered and the notification criteria are met, the message identifying one or more suppliers in the location with inventory that a user of the mobile communication device has expressed an interest in as indicated by the consumer interest data; and

computer memory holding computer program instructions executed by the processor to selectively deliver the message to the mobile communications device according to the notification criteria.

43. More particularly, Defendant infringes at least claim 1 of the '364 Patent. On information and belief, Defendant employs a processor with computer memory that holds computer program instructions to execute a rules engine that correlates data identifying a location of a mobile communication device, consumer interest data, data associated with one or more inventory attributes, and notification criteria that defines when a notification is to be delivered to the mobile communications device and a type of such notification.

44. In use of this system, the Defendant generates a message for delivery to the mobile communication device if at least one matching rule in the rules engine is triggered and the notification criteria are met in which the message identifying one or more suppliers in the location

with inventory that a user of the mobile communication device has expressed an interest in as indicated by the consumer interest data.

45. The system's memory further has stored instructions, that when executed, cause the processor to selectively deliver the message to the mobile communications device according to the notification criteria.

46. Aeritas has been damaged by Defendant's infringing activities.

COUNT IV
(Infringement of U.S. Patent No. 7,706,819)

47. Aeritas incorporates paragraphs 1 through 20 as though fully set forth herein.

48. Plaintiff is the owner, by assignment, of U.S. Patent No. 7,706,819 (the "'819 Patent"), entitled MIXED-MODE INTERACTION, which issued on April 27, 2010. A copy of the '819 Patent is attached as Exhibit PX-819.

49. The '819 Patent is valid, enforceable, and was duly issued in full compliance with Title 35 of the United States Code.

50. Defendant has been and is now infringing one or more claims of the '819 Patent under 35 U.S.C. § 271 by making and using the Whataburger App with users' iOS and Android devices and the Whataburger server in the United States without authority.

51. Defendant has also infringed the '819 Patent by encouraging users of the Whataburger App to use the user's iOS or Android devices with the Whataburger App to practice the claims of the '819 Patent. Defendant has notice of the '819 Patent at least as of the date of service of this complaint.

52. Claim 1 recites:

1. A method comprising:

receiving spoken input from a wireless communication device;
obtaining data identifying a current location of the wireless communication device;
based on the current location of the wireless communication device and the spoken input, retrieving information;
delivering, to the wireless communication device by a notification server, a non-verbal response to the spoken input, the non-verbal response based on the retrieved information and including a drill-down menu by which additional information related to the retrieved information can be obtained; and
providing additional information related to the retrieved information in response to receipt of at least one additional input provided via the drill-down menu.

53. More particularly, Defendant infringes at least claim 1 of the '819 Patent. Defendant receives spoken input from a wireless communication device. Defendant obtains data identifying the current location of the mobile device. Based on the location and the spoken input, Defendant retrieves information. Defendant delivers to the wireless device by a notification server, a non-verbal response to the spoken input, the non-verbal response based on the retrieved information and including a scroll-down menu by which additional information related to the retrieved

information can be obtained. Defendant provides additional information related to the retrieved information in response to receipt of at least one additional input provided via the scroll-down menu.

54. Aeritas has been damaged by Defendant's infringing activities.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests the Court enter judgment against Defendant:

1. declaring that the Defendant has infringed the '285, the '435, the '364, and the '819 Patents;
2. awarding Plaintiff its damages suffered as a result of Defendant's infringement of the '285, the '465, the '364, and the '819 Patents;
3. awarding Plaintiff its costs, attorneys' fees, expenses, and interest; and
4. granting Plaintiff such further relief as the Court finds appropriate.

JURY DEMAND

Plaintiff demands trial by jury, Under Fed. R. Civ. P. 38.

Dated: October 9, 2020

Respectfully submitted,

/s/ Raymond W. Mort, III

Raymond W. Mort, III

Texas State Bar No. 00791308

raymort@austinlaw.com

THE MORT LAW FIRM, PLLC

100 Congress Ave, Suite 2000

Austin, Texas 78701

Tel/Fax: (512) 865-7950

ATTORNEYS FOR PLAINTIFF

AERITAS, LLC